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In The Supreme Court of the United States

OCTOBER TERM, 1962

No. 65

AETNA INSURANCE COMPANY,

Petitioner,

vs.

PEDRO MENENDEZ,

Respondent.

Petition For a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit.

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In The Supreme Court of the United States

OCTOBER TERM, 1962

NO.

AETNA INSURANCE COMPANY,

Petitioner,

vs.

PEDRO MENENDEZ,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The petitioner, Aetna Insurance Company, a corporation organized and existing under the laws of the State of Connecticut, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, dated and entered October 17, 1962, reversing a final judgment of the United States District Court for the Southern District of Florida, Tampa Division, which dismissed, on the grounds of *forum non conveniens*, the complaint and action of the respondent, Pedro Menendez, a citizen of the Republic of Cuba.

OPINIONS BELOW

The opinion and final judgment of the district court (R.91-93) has not been reported, but is printed in App. A, p. 1, *infra*. The opinion of the court of appeals (R.98) presently is unreported, but will be reported in _____ F.2d _____. A copy thereof is printed in App. B, p. 6, *infra*. The opinion of the court of appeals in a companion case decided on the same day as this suit, to-wit, *Pedro Menendez Rodriguez v. Pan-American Life Insurance Company* and *Maria Cristina Vento Jaime v. Pan-American Life Insurance Company*, No. 19130, presently is unreported, but will be reported in _____ F.2d _____. A copy thereof is printed in App. B, pp. 8-25, *infra*.

JURISDICTION

The judgment of the court of appeals was dated and entered on October 17, 1962 (R. 100). A timely petition for rehearing filed by petitioner was denied by an order dated and entered on December 20, 1962 (R. 119). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The following questions are presented in connection with a suit by a Cuban citizen, who is a refugee from Castro's Cuba and who is now residing in Florida, against a Connecticut insurance corporation authorized to do business in Connecticut, Cuba, Florida, and elsewhere, to recover in United States money the sum of $75,120.90 alleged to be due under a policy of fire insurance issued in Cuba and payable, under Cuban law, only in Cuba and in Cuban currency, which suit was dismissed on the ground of *forum non conveniens* by a final

judgment of the United States District Court for the Southern District of Florida, Tampa Division, and which judgment of dismissal was reversed by the United States Court of Appeals for the Fifth Circuit:

1. May the court of appeals reverse the judgment of the district court without determining that, in applying the doctrine of *forum non conveniens*, the district court exceeded its powers or the bounds of its judicial discretion?

2. Did the court of appeals err in applying to this suit the established judicial policy applicable in the field of maritime law in cases involving foreign suitors, plaintiffs and defendants, that where controversies are *communis juris*—that is, which arise under the common law of nations—jurisdiction should be taken unless to do so would work an injustice?

3. Did the court of appeals err in holding that, to be entitled to a dismissal of the respondent's suit on the ground of *forum non conveniens*, the petitioner was required to show not only that there was a forum open to the respondent in Cuba in which the petitioner was amenable to process but also that the respondent could obtain justice in the courts of Cuba?

4. Where the sovereign government of the Republic of Cuba, within its own territory, had expropriated the respondent's claim under the petitioner's fire insurance policy and had collected from the petitioner, in Cuba, the full amount of the said fire loss, before the filing of this suit by respondent against the petitioner to recover on the same fire claim, did the court of appeals err in declaring that our courts are not compelled by the Act of State doctrine to give full force and effect to the decrees of the Castro Government in

Cuba and in requiring the district court to determine whether the expropriation decrees of the Cuban Government are confiscatory or otherwise violative of fundamental concepts of justice and, therefore, without status in the respondent's suit against the petitioner?

5. Did the court of appeals err in deciding that consistently, repeatedly and concurrently the State Department has expressed its conclusion that our courts are not restrained from adjudicating the effect of the expropriation decrees of the Castro Government in Cuba?

STATUTES AND DECREES INVOLVED

The statutes and decrees involved are the following laws and decrees enacted and promulgated by the Republic of Cuba, to-wit, Decree No. 1384, of April 9, 1951, Law No. 568, of September 29, 1959, and Law No. 151, of March 17, 1959.

The pertinent text of Decree No. 1384 is set forth in App. D, pp. 29-32, *infra*. The pertinent text from Law No. 568 is set forth in App. D, p. 33, *infra*. The pertinent text from Law No. 151 is set forth in App. D, pp. 34-36, *infra*.

STATEMENT OF THE CASE

On July 28, 1960, the respondent filed his complaint in the Circuit Court of Hillsborough County, Florida, against the petitioner seeking to recover the sum of $75,120.90 alleged to be due under the provisions of a policy of fire insurance issued by the petitioner in Cuba insuring certain barns and contents owned by the respondent and situated in Cuba, which were damaged or destroyed by a fire which occurred on November 20, 1958, and to receive attorneys' fees and costs (R. 5-9).

Pursuant to the provisions of 28 U.S.C. § 1441, *et seq.*, the petitioner removed the suit to the district court. Jurisdiction of the district court was invoked under the provision of 28 U.S.C. § 1332, in that the respondent is a citizen and subject of the Republic of Cuba and the petitioner is a corporation organized under the laws of the State of Connecticut, with its principal place of business in Hartford.

In the district court, the petitioner filed a motion to dismiss the complaint, an answer and defenses, and an amendment to its answer and defenses (R.9-10, 11-27, 28-36).

The respondent requested the petitioner to admit certain facts and documents (R. 36-48). In answer to the respondent's request for admissions, the petitioner denied certain requests, asserted it was without knowledge as to the truth of the matters set forth in other requests and therefore denied the same, admitted with qualifications certain requests and admitted in full certain other requests (R. 48-50). The respondent and the petitioner each filed an affidavit in support of their respective positions with respect to the petitioner's motion to dismiss the suit on the ground of *forum non conveniens* (R. 50-64, 65-90). The affidavit on behalf of petitioner had attached thereto a true and complete copy of the aforesaid insurance policy (R. 69-88).

The pleadings, admissions and denials, affidavits and exhibits showed and show the following facts, issues and contentions to be involved in the pending suit:

1. Pedro Menendez was and is a citizen and national of the Republic of Cuba, and for many years prior to January 1959, he resided in Cuba, where he was a landowner, tobacco grower and farmer (R. 50,51). In 1958 he served in the Cuban Senate as a senator from the Province of Pinar del Rio (R.54).

2. On or about January 31, 1952, in the Republic of Cuba, the petitioner issued its standard insurance policy, No. 55214, insuring against loss and damage by fire and cyclone certain barns and their contents situated in Cuba (R. 69-88). From January 31, 1952, to July 8, 1957, the named insured in the policy was "Cuban Land and Leaf Tobacco Company, por cuenta de Pedro Menendez." On July 8, 1957, the policy was endorsed to name "Sr. Pedro Menendez" as the insured therein instead of "Cuban Land and Leaf Tobacco Company, por cuenta de Pedro Menendez" (R. 72). Thereafter, Pedro Menendez remained the sole named insured in the policy until the same was canceled on December 10, 1958 (R. 8-9, 70).

3. The policy expressly provided that all premiums and all losses be paid in Cuba in Cuba currency, or pesos (R.11, 28-29), and that, in the event of litigation arising from the policy, the parties submitted themselves to the tribunals of Cuba (R. 12). On November 20, 1958, certain insured barns and their contents were damaged by fire, thereby giving rise to a claim under the petitioner's policy. The respondent did not file suit within one year thereafter, as required by the provisions of the policy, and actually did not file this action until July 28, 1960 (R. 12).

4. Long prior to the rise of the Castro regime, the Republic of Cuba, by Decree No. 1384, dated April 9, 1951, required after June 30, 1951, a date prior to the issuance of the insurance policy involved, all obligations contracted or payable in the national territory of Cuba to be paid in Cuba in Cuban currency (R. 28-30, 31-34; App. D, pp. 29-32, *infra*). The petitioner's policy or contract of insurance was made in Cuba and the petitioner's financial obligations thereunder were payable in Cuba. Thus, Cuban law required payments due under the policy to be paid in Cuba in Cuban currency.

5. On or about January 1, 1959, the Revolutionary Government of the Republic of Cuba, headed by Fidel Castro, acquired control of the government of Cuba. Pedro Menendez immediately fled from Cuba to the State of Florida (R. 50-51, 54).

6. The new government in Cuba promptly enacted laws declaring certain persons to be traitors and confiscating their properties. Law No. 151 of 1959 covering this matter was published in the *Official Gaceta* on March 17, 1959 (R. 13-14, 24-25; App. D, pp. 34-36, *infra*). On April 7, 1959, Pedro Menendez was declared by the new government to be a person subject to the provisions of said Law No. 151 by the publication of his name in the *Official Gaceta*, and all of his goods and properties were confiscated by the Cuban Government, including any claim under the petitioner's insurance policy for the fire loss of November 20, 1958 (R. 13-14, 18-23, 54-55).

7. The new government thereupon proceeded to collect and collected from the petitioner, in Cuba, the full amount of said fire loss, to-wit, $60,592.10, and exe-

cuted and delivered to the petitioner a release and discharge of all claims for the said fire loss (R. 15-16, 18-23, 67-68, 89).

8. By reason of the confiscation by the Republic of Cuba of the properties of the respondent, including any claims under the insurance policy for the fire loss of November 20, 1958, any right of action for the said loss vested in and became the sole property of the Republic of Cuba, and the respondent had and has no interest therein, right thereto or standing to maintain or prosecute this action therefor (R. 14).

9. After the loss occurred, but before this suit was instituted, the Republic of Cuba enacted Law No. 568, which became effective October 2, 1959. Under that law, it was made a felony for the petitioner to pay or for the respondent to receive any payment outside of Cuba for business transactions or services rendered in Cuba (R. 30, 35-36; App. D, p. 33). By virtue of said law, payment by the petitioner to the respondent in United States currency of the respondent's claim under the insurance policy would constitute the commission of a felony, would expose the petitioner and its agents to prosecution therefor and to criminal penalties including imprisonment or fine, or both, and would subject petitioner to intervention and the confiscation of its business and assets located in Cuba (R. 30, 35-36).

10. Continuously, since January 7, 1959, the government of the United States of America has recognized and now recognizes the Provisional Government of the Republic of Cuba, of which Fidel Castro is Premier, and the severing by the United States of diplomatic and consular relations with the Cuban Government on January 5, 1961, did not constitute a cessation of recognition of said Cuban Government.

11. All of the transactions, occurrences and matters involved in the suit took place in the Republic of Cuba, and the issues involved in this action are governed and controlled by the laws, decrees, declarations and proclamations of the Republic of Cuba.

12. The respondent's claim did not accrue within the jurisdiction of the district court, and the subject matter of the suit has no connection with or relationship to the citizens who reside within the jurisdiction of the district court.

13. The docket of the district court is crowded, the issues involved are not local in nature, but are foreign to the district court and the citizens of the district who would be called to serve as jurors, and to permit this suit to be prosecuted would burden the district court unnecessarily with difficult and complicated litigation.

14. For the convenience of parties and witnesses and in the interest of justice, the district court should abstain from exercising jurisdiction in this suit.

The district court, after considering the pleadings, affidavits, oral arguments and briefs submitted by counsel for the respective parties, on May 22, 1961, entered its final judgment dismissing the respondent's complaint and action on the ground of *forum non conveniens*, without prejudice, however, to the right of the respondent to institute an action on his claim in *any other appropriate court* (R. 91-92).

In its final judgment, the district court made the following findings (R. 91-92):

"A. The plaintiff, Pedro Menendez, is a citizen of the Republic of Cuba, who is and since about January 1959 has been residing in the State of Florida.

"B. The defendant, Aetna Insurance Company of Hartford, Conn., is a corporation organized and existing under the laws of the State of Connecticut, and at all times material herein the defendant was qualified to do business and did business in the Republic of Cuba.

"C. All of the transactions, occurrences and matters involved in this suit took place in the Republic of Cuba, and the issues involved in this action are governed and controlled by the laws, decrees, declarations and proclamations of the Republic of Cuba.

"D. The plaintiff's claim did not accrue within the jurisdiction of this Court, and the subject matter of this suit has no connection with or relationship to the United States or the latter's citizens who reside within the jurisdiction of this Court.

"E. The docket of this Court is crowded, and to permit this suit to be prosecuted would burden this Court unnecessarily with difficult and complicated litigation.

"F. For the convenience of parties and witnesses and in the interest of justice, the plaintiff's claim best could be litigated and disposed of in the Republic of Cuba.

"G. For the reasons hereinbefore stated, among others, this action should be dismissed on the ground of *forum non conveniens*."

The respondent perfected an appeal to the court of appeals (R. 93).

On October 17, 1962, the court of appeals reversed the district court for the reasons stated in its opinion in *Pedro Menendez Rodriguez v. Pan-American Life Insurance Company* and *Maria Cristina Vento Jaime v. Pan-American Life Insurance Company*, No. 19130, decided on the same day and remanded the cause for further proceedings not inconsistent with its opinion therein (R. 98-99; App. B, pp. 6-8, 8-25). The petitioner timely filed a petition for rehearing (R. 102-118), which was denied on December 20, 1962 (R. 119-120).

In its opinion in Case No. 19130, *Pedro Menendez Rodriguez v. Pan-American Life Insurance Company* and *Maria Christina Vento Jaime v. Pan-American Life Insurance Company*, the court said that this suit is companionable with Case No. 19130, that their component parts are identical in many respects and that the ultimate determination of the two appeals rests upon the same foundation (App. B, p. 9, *infra*).

With respect to the doctrine of *forum non conveniens*, the court of appeals, in its opinion in Case No. 19130, stated that the district court's application of the doctrine to the respondent's suit (under the district court's theory that the respondent had open to him, among others, a forum in Cuba in which the petitioner was amenable to process) was not an abuse of discretion by the district court in the application of a traditionally equitable doctrine, but was an erroneous application of law to the established facts (App. B, p. 14, *infra*). The court of appeals then proceeded to state the law which it felt the district court should have applied.

After recognizing the settled rule that at least two forums must be open to a plaintiff in which the defendant is amenable to process before the doctrine of *forum*

non conveniens comes into play, the court of appeals then stated that the district court should have applied the rule announced in *The Belgenland*, 114 U.S. 355, 367 (1885) and *Motor Distributors, Ltd. v. Olaf Pedersen's Rederi A/S*, 239 F.2d 463, 465 (5th Cir. 1956) (App. B, p 15, *infra*). The rule announced in the last cited cases is the established judicial policy applicable in the field of maritime law in cases involving foreign suitors, plaintiffs and defendants, that where controversies are *communis juris*—that is, which arise under the common law of nations instead of under the law of a single nation—jurisdiction should be taken unless to do so would work an injustice.

Further, the court of appeals stated that, to be entitled to a dismissal on the ground of *forum non conveniens*, the petitioner must show that the respondent, who is a Cuban national and refugee from Castro's Cuba, could obtain justice in the courts of Cuba (App. B, pp. 15-16, *infra*). This burden was imposed in addition to the requirement of showing that there was a forum open to the respondent in Cuba in which the petitioner was amenable to process.

The court of appeals then discussed the applicability to the respondent's suit of the Act of State doctrine, which was described as a second and more crucial issue raised on the petitioner's motion to dismiss the respondent's complaint (App. B, pp. 18-25, *infra*). The court of appeals defined the Act of State doctrine as a rule of conflict of laws which holds that American courts will not look into or pass upon the validity of the acts of foreign governments performed in their capacities as sovereigns within their own territories (App. B, p. 19, *infra*).

The court of appeals announced that the executive branch of our government, through the State Department, had expressed its conclusion that our courts are not restrained from adjudicating the effect of expropriation decrees of the Castro Government in Cuba. The court of appeals cited the case of *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845 (2d Cir. 1962) as being dispositive of the issue concerning the applicability of the Act of State doctrine to the respondent's suit (App. B, pp. 19-23, *infra*). The court of appeals then declared that our courts are not compelled by the Act of State doctrine to give full force and effect to the decrees of the Castro Government in Cuba and required the district court to determine whether the expropriation decrees of the Cuban Government are confiscatory or otherwise violative of fundamental concepts of justice and, therefore, without status in the respondent's suit against the petitioner (App. B, pp. 23-24, *infra*). The court of appeals stated that it matters not whether the thrust of the Cuban expropriation decrees be directed against Cuban nationals or American citizens (App. B, p. 24, *infra*).

In its aforesaid opinion, the court of appeals noted that in the record before it there was no expression of any kind from the State Department and that none has been requested and that it did not perceive any necessity for formal comment by the State Department about this case (App. B, pp. 24-25, *infra*).

The court of appeals reversed the judgment of the district court dismissing the respondent's complaint and remanded the cause for further proceedings not inconsistent with the opinion of the court of appeals in Case No. 19130 (R. 98-99; App. B, pp. 6-7, 8-25, *infra*).

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. That part of the decision sought to be reviewed which relates to the doctrine of *forum non conveniens* is in conflict with applicable decisions of this Court and of other courts of appeals on the same matter.

The court of appeals stated that the district court's application of the doctrine of *forum non conveniens* was not an abuse of discretion by the district court in the application of a traditionally equitable doctrine, but was an erroneous application of law to the established facts (App. B, p. 14, *infra*). The court of appeals then set forth two principles of law which it stated the district court erroneously failed to apply, thereby requiring reversal of the district court's judgment of dismissal. One of said principles is the established judicial policy in the field of maritime law in cases involving foreign suitors that where controversies are *communis juris* jurisdiction should be taken unless to do so would work an injustice (App. B, p. 15, *infra*). The other is that, to be entitled to a dismissal on the ground of *forum non conveniens*, a defendant must show (a) that there is another forum open to the plaintiff in which the defendant is amenable to process, and (b) that the plaintiff can obtain justice in such forum (App. B, pp. 15-16, *infra*).

The petitioner respectfully submits that the decision of the court of appeals conflicts with applicable decisions of this Court and other courts of appeals in three basic respects. First, absent a determination that the district court exceeded its powers or the bounds of its judicial discretion, the court of appeals should not have reversed the judgment of dismissal of the

district court. Secondly, in suits which were not between foreigners and that did not involve maritime controversies which were *communis juris*, the court of appeals should not have held that the district court should have taken jurisdiction unless to do so would work an injustice. Thirdly, the court of appeals should not have imposed upon the petitioner the burden of showing that the respondent could obtain justice in the courts of Cuba.

A. The application of the doctrine of *forum non conveniens* is entrusted to the discretion of a district court to be exercised upon equitable considerations, and a district court's determination may not be disturbed on appeal except for a clear abuse of discretion. *Gulf Oil Corporation v. Gilbert*, 330 *U.S.* 501 (1947); *Hopson v. Hopson*, 221 F.2d 839 (D.C.Cir.1955); *Simons v. Simons*, 187 F. 2d 364 (D.C. Cir. 1951); *The Mandu*, 102 F. 2d 459 (2d Cir. 1939); *The Kanto Maru*, 112 F. 2d 564 (9th Cir. 1940).

The leading case on the doctrine of *forum non conveniens* is *Gulf Oil Corporation v. Gilbert*, *supra*. In that case, a judgment of the district court dismissing an action on the ground of *forum non conveniens* was reversed by the court of appeals, and the defendant brought certiorari. After a thorough discussion of the doctrine and of the applicable factors of private and public interest involved, this Court reversed the court of appeals. Much said in that case is applicable here.

It is the duty of a district court, having the parties before it, to apply all of the applicable law, including in those cases where it is appropriate, its discretionary judgment as to whether the suit should be entertained. *Gulf Oil Corporation v. Gilbert*, *supra*, 330 U.S. at 506.

In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them. *Gulf Oil Corporation v. Gilbert, supra,* 330 U.S. at 506-507.

The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute. *Gulf Oil Corporation v. Gilbert, supra,* 330 U.S. at 507.

The doctrine leaves much to the discretion of the court to which the plaintiff resorts, and experience has not shown a judicial tendency to renounce one's own jurisdiction so strong as to result in many abuses. *Gulf Oil Corporation v. Gilbert, supra,* 330 U.S. at 508.

If the combination and weight of factors requisite to given results are difficult to forecast or state, those to be considered are not difficult to name. An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Factors of public interest also have place in applying the doctrine. *Gulf Oil Corporation v. Gilbert, supra,* 330 U.S. at 508-509.

In the last cited case, this Court enumerated many specific private and public factors to be considered in applying the doctrine. Many of those factors were considered by the district court in the case by the respondent against the petitioner and several were set forth as findings in and constituted the basis of the judgment of dismissal of the district court (App. A, p. 1, *infra*).

In *Gulf Oil Corporation v. Gilbert, supra,* in reversing the court of appeals, this Court said, 330 U.S. at 512:

> "We are convinced that the District Court did not exceed its powers or the bounds of its discretion in dismissing plaintiff's complaint and remitting him to the courts of his own community. The Circuit Court of Appeals took too restrictive a view of the doctrine as approved by this Court. Its judgment is reversed."

The above cited decision of this Court conclusively established that a judgment of dismissal on the ground of *forum non conveniens* may not be reversed and must be affirmed unless the appellate court finds that the district court exceeded its powers or the bounds of its discretion in dismissing the suit.

Other courts of appeals have rendered decisions consistent with the decision of this Court in *Gulf Oil Corporation v. Gilbert, supra.*

In *Hopson v. Hopson, supra,* the court said, at p. 842:

> "Application of the doctrine of *forum non conveniens* is entrusted to the discretion of the District Court to be exercised upon equitable considerations, and its determination may not be disturbed on appeal except for a clear abuse of this discretion. * * *"

In *The Kanto Maru, supra,* in discussing the doctrine of *forum non conveniens*, the court said, at p. 565:

> "* * * This court has no power to exercise any discretion in the matter and can only reverse the decision of the District Court in case there has been an abuse of discretion by that court. * * *"

It is clear that the decision of the court of appeals is in conflict with the above cited decision of this Court and with the above cited decisions of other courts of appeals, all on the same matter.

It is important to note that there was no determination by the court of appeals that the findings of the district court set forth in its judgment of dismissal were not true or were not supported by the record.

The court of appeals did not find that the district court abused its discretion in applying the doctrine of *forum non conveniens* and did not reverse the district court's judgment on that ground (App. B, p. 14, *infra*). The court of appeals, in reversing the district court's dismissal of the respondent's suit without finding that the district court abused its discretion, decided in a manner contrary to the decision of this Court in *Gulf Oil Corporation v. Gilbert*, *supra*, and in conflict with the above cited decisions of other courts of appeals.

B. The petitioner respectfully submits that the court of appeals erroneously held that the district court, in considering the petitioner's motion to dismiss the respondent's suit on the ground of *forum non conveniens*, should have applied the law set forth in *The Belgenland*, *supra*, and *Motor Distributors, Ltd. v. Olaf Pedersen's Rederi A/S*, *supra* (App. B, p. 15, *infra*).

The court of appeals held that trial courts have jurisdiction even of a suit between two foreigners "and that they will exercise it unless special circumstances exist to show *that justice would be better served by declining it*" (App. B, p. 15, *infra*). It further held that, instead of dismissing a suit in favor of a foreign court, jurisdiction should be taken unless to do so would work an injustice (App. B, p. 15, *infra*).

The holdings cited in the preceding paragraph are applicable only in the field of maritime law in cases involving foreign suitors and where controversies are *communis juris*. In those cases jurisdiction should be taken unless to do so would work an injustice. The holdings cited in the preceding paragraph are wholly inapplicable to a suit of the kind instituted by the respondent against the petitioner. The pending suit does not concern maritime controversies. It concerns controversies over the claim of an insured under a fire insurance policy. This case is not between foreign suitors. The respondent is a foreigner, but the petitioner is a Connecticut corporation authorized to do business in Florida, Cuba and elsewhere. The controversies involved in the suit are not *communis juris*, i.e., they do not arise under the common law of nations. Instead, they arise under and are controlled by the laws of a single nation, to-wit, Cuba.

The Belgenland, *supra*, involved a ship collision on the high seas. All of the parties were citizens of foreign states and the ship sued in rem was of foreign ownership and registry. In that case, this Court said, 114 U.S. at 365:

> "* * * although the courts will use a discretion about assuming jurisdiction of controversies between foreigners in cases arising beyond the territorial jurisdiction of the country to which the courts belong, yet where such controversies are communis juris,—that is, where they arise under the common law of nations,—special grounds should appear to induce the court to deny its aid to a foreign suitor when it has jurisdiction of the ship or party charged. The existence of jurisdiction in all such cases is beyond dispute; the only question will be whether it is expedient to exercise it."

This Court said, 114 U.S. at 367:

> "The subject has frequently been before our own admiralty courts of original jurisdiction, and there has been but one opinion expressed, namely, that they have jurisdiction in such cases, and that they will exercise it unless special circumstances exist to show that justice would be better subserved by declining it."

This Court also said, 114 U.S. at 368:

> "Indeed, where the parties are not only foreigners, but belong to different nations, and the injury or salvage service takes place on the high seas, there seems to be no good reason why the party injured, or doing the service, should ever be denied justice in our courts."

This Court further said, 114 U.S. at 369:

> "Neither party has any peculiar claim to be judged by the municipal law of his own country since the case is pre-eminently one communis juris and can generally be more impartially and satisfactorily adjudicated by the court of a third nation having jurisdiction of the res or parties, than it could be by the courts of either of the nations to which the litigants belong."

Motor Distributors, Ltd. v Olaf Pedersen's Rederi A/S, supra, involved a libel in rem in admiralty in a district court in Florida against the *M/V Sunny Prince,* a Norwegian vessel, by nationals of other foreign countries in a cause arising out of the striking and sinking on the high seas of the *M/V Hoheweg* by the *M/V Sunny Prince.* The district court declined to take jurisdiction. The United States Court of Appeals for the Fifth Circuit reversed the judgment of the district court because the latter departed from the correct principle of law stated in *The Belgenland, supra.*

For the reasons hereinbefore set forth, it is abundantly plain that the court of appeals erred in holding that the district court should have applied the foregoing admiralty principle in the case at bar.

C. In deciding that, to be entitled to a dismissal of the respondent's suit on the ground of *forum non conveniens,* the petitioner must show that the respondent, who is a Cuban national and refugee from Castro's Cuba, can obtain justice in the courts of Cuba (App. B, pp. 15-16, *infra*), the court of appeals erroneously imposed upon the petitioner a burden which no other court ever has held to exist, and erroneously departed from the rule of law, established in decisions of this Court and other courts of appeals, that in all cases in which the doctrine of *forum non conveniens* comes into play it merely presupposes at least two forums open to the plaintiff in which the defendant is amenable to process and furnishes criteria for a choice between them. *Gulf Oil Corporation v. Gilbert, supra; Tivoli Realty, Inc. v. Interstate Circuit, Inc., et al.,* 167 F.2d 155 (5th Cir. 1948); *Vanity Fair Mills v. T. Eaton Co.,* 234 F.2d

633 (2d Cir. 1956); *De Sairigne v. Gould,* 83 F. Supp. 270 (S.D.N.Y. 1949), *aff'd,* 177 F.2d 515 (2d Cir. 1949), *cert.den.,* 339 U.S. 912 (1950); *Heine v. New York Life Ins. Co.,* 50 F.2d 382 (9th Cir. 1931), *affirming* 45 F.2d 426 (D.C. Ore. 1930).

This Court did not require a showing by the defendant in *Gulf Oil Corporation v. Gilbert, supra,* that the plaintiff therein, a Virginia resident, could obtain justice in the courts of Virginia to which this Court remitted him. In that case, this Court was convinced that the district court did not exceed its powers or the bounds of its discretion in dismissing the plaintiff's complaint and remitting him to the courts of his own community, and did not inquire as to whether the courts of his own community would give him justice. This Court affirmed the district court and reversed the court of appeals, which it said had taken too restrictive a view of the doctrine of *forum non conveniens.*

In *Heine v. New York Life Ins. Co., supra,* a suit by a German citizen to recover the cash surrender value of insurance policies issued in and payable in Germany was filed in a state court in Washington and thereafter was removed to a federal district court. The district court, in the exercise of its discretion to retain or reject jurisdiction, dismissed the action. In dismissing that suit, the district court did not inquire, and was not required to inquire, whether the plaintiff would receive justice in another forum. The dismissal of the suit was affirmed by the United States Court of Appeals for the Ninth Circuit.

The Court of Appeals for the Second Circuit did not require a showing that the courts of Canada would afford justice to the plaintiff in *Vanity Fair Mills v. T. Eaton Co., supra*, when it remitted that part of plaintiff's claim resting on Canadian law to Canadian courts. There a Pennsylvania corporation had sued two Canadians alleging the infringement of a United States trade-mark by a Canadian trade-mark and unfair competition both in the United States and Canada. The district court held that it lacked subject matter jurisdiction over that part of the complaint raising Canadian trade-mark issues. The court of appeals held that the district court did not abuse its discretion in declining to exercise its jurisdiction over that portion of the case arising in Canada and governed by Canadian trade-mark law. Neither the district court nor the appellate court inquired whether a Canadian court would afford justice to the plaintiff. There was and is no such prerequisite to the application of the doctrine of *forum non conveniens*.

In *De Sairigne v. Gould, supra*, the United States Court of Appeals for the Second Circuit affirmed the decision of the district court to remit the plaintiff, a citizen of France, to the courts of France, where the agreement in controversy had been made. Whether or not the courts of France would render justice to the plaintiff was not held to be a requirement for applying the doctrine of *forum non conveniens*.

In *Prack v. Weissinger*, 276 F. 2d 446 (4th Cir. 1960), in reviewing the application of the doctrine of *forum non conveniens* to a suit by a citizen of West Germany against an American soldier stationed in Virginia for damages sustained in an automobile

accident which occurred in Germany while defendant was stationed there, the United States Court of Appeals for the Fourth Circuit said, 276 F.2d 448:

> "* * * Accordingly, by order filed November 13, 1958, he directed that the action be dismissed, 'without prejudice to institute the action *in any other appropriate court.*' (Emphasis supplied.) Such determination is consistent with the inherent power of federal courts to refuse jurisdiction of cases not within the purview of the provisions of 28 U.S.C.A. § 1404 (a)—cases which should have been brought in a foreign jurisdiction rather than in the United States. Vanity Fair Mills v. T. Eaton Co., 2 Cir. 1956, 234 F.2d 633, 645; Wilson v. Kansas City Southern Ry., D.C.W.D.Mo. 1951, 101 F.Supp. 56, 60; Latimer v. S/A Industrias Reunidas F. Matarazzo, D.C.S.D. N.Y. 1950, 91 F.Supp. 469, 470; De Sairigne v. Gould, D.C.S.D. N.Y. 1949, 83 F.Supp. 270, 273. * * *"

The order referred to in the above quotation had been entered in another suit. There was no appeal therefrom. It thereafter was considered in connection with the review of another dismissal by a second federal district court in Virginia. The defendant was not required to show, in either of said suits, that the plaintiff could obtain justice in the courts of Germany.

In its opinion, the court of appeals stated that the decision in *North Branch Products, Inc. v. Fisher*, 284 F.2d 611 (D.C.Cir.1960), *cert. den.* 365 U.S. 827, was close in point in connection with the court's determination that the petitioner must show that the respondent could obtain justice in the courts of Cuba (App. B, p. 16, *infra*).

It is submitted that the facts in the last cited case are substantially different from those in the case at bar, and that the court of appeals, in concluding that the cited case is close in point herein, overlooked the difference in the citizenship of the parties concerned and the law of which sovereign controlled the controversies between the parties. In that case, a Michigan corporation sued a citizen of Michigan (but a resident of Canada) in a federal district court in the District of Columbia to determine rights in United States patents and patent applications. The district court dismissed on the ground that either a Michigan state court or a court in Canada would be a more convenient forum. The court of appeals reversed, stating that jurisdiction of the defendant could not be obtained in Michigan, and that there was no certainty that a Canadian court would be compelled to assume jurisdiction of an action filed in Canada by the plaintiff, a citizen of Michigan, against the defendant, a Canadian resident, relating to matters which arose in and were controlled by the laws of the United States.

The last mentioned case easily can be distinguished from the case at bar, and actually is more favorable to the position of the petitioner than that of the respondent. In that case, the controversy arose in the United States and was governed by the laws of the United States. In the case at bar, the controversies are controlled by Cuban laws. In that case, the plaintiff was an American corporation, and the defendant was a United States citizen residing in Canada. In the case at bar, the plaintiff is a Cuban citizen residing in Florida, and the defendant is a Connecticut corporation authorized to do business in Florida. There, a suit was pending in the District of Columbia. Here, a suit is pending in the district court in Florida. There, the

American court was not sure a Canadian court would assume jurisdiction of a suit by an American citizen in a Canadian court over a controversy controlled by patent and other laws of the United States. Here, it was and is shown that the plaintiff, a Cuban national, has a forum open to him in Cuba, that the defendant is amenable to process in Cuba, and that Cuban law controls the controversies. The situations are entirely different, and it is submitted that the cited case does not support the decision of the court of appeals.

The court of appeals did not cite any authority which sustained its holding that the petitioner was required to show that the respondent could obtain justice in the courts of Cuba. Actually the court's decision is a new rule of law which is in conflict with the above cited decisions of this Court and other courts of appeals.

The court's decision places an impossible burden upon any defendant who would invoke the doctrine of *forum non conveniens* because it is impossible for a defendant in one court to show that in any other court, whether the same be a state or federal court in this country or a court in some foreign nation, a plaintiff can obtain justice. For example, there is no way for a defendant to show that another court will not also apply the doctrine of *forum non conveniens*, as was the case in *Prack v. Weissinger, supra*, or that another court will reach a just decision with respect to the rights of the plaintiff.

It is submitted that the court of appeals erred in imposing upon the petitioner the burden of showing that the respondent could obtain justice in the courts of Cuba.

D. It is submitted that the court of appeals erred in holding applicable to the facts in the case at bar the principles of law discussed under headings B and C, *supra;* that the findings of the district court which are set forth in its judgment were and are not subject to successful attack; that the district court, in applying the doctrine of *forum non conveniens* to the respondent's suit did not exceed its powers or the bounds of its judicial discretion; and that the decision of the court of appeals relating to the doctrine of *forum non conveniens* should be reviewed by this Court for the special and important reasons set forth above.

2. That part of the decision of the court of appeals sought to be reviewed which relates to the Act of State doctrine is in conflict with a number of decisions of this Court and of other courts of appeals on the same matter.

In Florida at the present time there reside more than one hundred thousand refugees from the Castro Government in Cuba. Many of these refugees own or owned real property and tangible and intangible personal property situated in Cuba. Some of this property has been expropriated by laws and decrees of the Cuban Government. Some of these Cuban nationals are parties to contracts, including insurance policies, which were executed and delivered in Cuba, and which are controlled by Cuban laws and decrees.

Some of the Cubans residing in Florida have instituted suits in state and federal courts in Florida involving controversies which arose in Cuba or which are governed and controlled by Cuban laws and decrees. Some courts have assumed and exercised jurisdiction of such suits, and others have dismissed the same by applying thereto the doctrine of *forum non conveniens* or the Act of State doctrine, or both doctrines.

Some of these suits have brought into consideration important and difficult questions in the field of international law. The case at bar is among them, and involves questions of international law and relations between the executive and judicial branches of the United States Government.

There are special and important reasons hereinbefore set forth and hereafter to be stated why this Court should review on writ of certiorari the judgment of the court of appeals.

A. The court of appeals erred in deciding that American courts are not compelled by the Act of State doctrine to give full force and effect to the expropriation decrees of the Castro Government in Cuba, and in requiring the district court to determine whether the decrees of the Cuban Government relating to the respondent's claim under the fire insurance policy issued by the petitioner insuring certain barns and their contents, situated in Cuba, are confiscatory or otherwise violative of fundamental concepts of justice and, therefore, without status in the respondent's suit against the petitioner.

In *Underhill v. Hernandez,* 168 U.S. 250 (1897), this Court said, at p. 252:

> "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of another done within its own territory."

To the same effect, see *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1917); *Ricaud v. American Metal*

Co., 246 U.S. 304 (1917); *American Banana Co. v. United Fruit Company*, 213 U.S. 347 (1909); *Shapleigh v. Mier*, 299 U.S. 468 (1937); *United States v. Belmont*, 301 U.S. 324 (1937); *United States v. Pink*, 315 U.S. 203 (1942).

In *Pons v. Republic of Cuba*, 294 F.2d 925 (D.C. Cir. 1961), *cert. den.*, 368 U.S. 960 (1962), wherein one of the issues was the alleged illegal expropriation in Cuba by the Castro Government of the property of a Cuban national, the court invited the State Department to file briefs, if it should see fit, expressing its views on the issues involved, but no brief was filed, and the court applied the Act of State doctrine and declined to sit in judgment on the decree of expropriation.

It is a well established principle that what another country has done in the way of taking over property of its nationals is not a matter for judicial consideration in the courts of this country, and that such nationals must look to their own government for any redress to which they may be entitled. *United States v. Belmont, supra; Oetjen v. Central Leather Co., supra, Pons v. Republic of Cuba, supra; Banco de Espana v. Federal Reserve Bank*, 114 F.2d 438 (2 Cir. 1940); *Bollack v. Societe Generale Pur Favoriser, Etc.*, 177 Misc. 136, 30 N.Y.S. 2d 83 (1941); *M. Salimoff & Co. v. Standard Oil Co.*, 262 N.Y. 220, 186 N.E. 679 (1933); *Holzer v. Deutsche Reichsbahn-Gesellschaft*, 277 N.Y. 474, 14 N.E. 2d 798 (1938); *Dougherty v. Equitable Life Assur. Soc.*, 266 N.Y. 71, 193 N.E. 897 (1934); *Kleve v. Basler Lebens-Versicherungs-Gesellschaft*, 45 N.Y.S.2d 882 (1943); *Bloch v. Basler Lebens-Versicherungs-Gesellschaft*, 73 N.Y.S. 2d 523 (1947); *Jorge v. Antonio Company*, 19 Fla. Supp. 101 (Fla. Cir. Ct. 1961).

In *Bernstein v. Van Heyghen Freres, S.A.*, 163 F.2d 246 (2d Cir. 1947), *cert. den.*, 332 U.S. 772, the Act of State doctrine was applied to defeat the claim of a former German Jew to property taken from him by confiscatory and discriminatory acts of the Nazi Government in Germany.

Following the last cited decision, the State Department relieved American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of acts of Nazi officials. In another case brought by *Bernstein*, the court of appeals amended its earlier decree, 173 F.2d 71 (2d Cir. 1949), and ordered the district court to try the case on the merits. *Bernstein v. N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954).

The *Bernstein* cases disclosed that a court will not review the acts of a foreign sovereign affecting property within its territory unless the Executive Branch states, in some formal manner, that it has no objection to such examination.

In the case at bar, the court of appeals considered that the case of *Banco Nacional de Cuba v. Sabbatino, supra*, was dispositive of the issues raised by the respondent's appeal. The court of appeals, however, overlooked that, in *Banco*, that court was careful to make clear that its opinion did not apply to the situation where the expropriation decrees of a sovereign nation were directed against its own nationals, saying, 307 F. 2d 861:

> "* * * It is generally accepted, as appellant says, that acts of a state directed against its own nationals do not give rise to questions of international law. Zander, *The Act of State Doctrine*,

> 53 Am.J. Int'l Law 826, 836 (1959); 1 Oppenheim, International Law, 268 n.2 (8th ed. 1955); Friedman, Expropriation in International Law 163 (1953); see *M. Salimoff & Co. v. Standard Oil Co.*, 262 N.Y. 220, 186 N.E. 679 (1933). * * *"

The court of appeals, in the decision sought to be reviewed said (App. B, p. 24, *infra*):

> "* * * it matters not whether the thrust of those decrees be directed against Cuban nationals or American citizens. * * * The action of the Cuban agent was dismissed in the *Banco* case, and for the same reasons we reverse the dismissal of the complaints here."

The court of appeals did not recognize the distinction upon which the decision in *Banco* was made. As a consequence, it entered a judgment in conflict with the *Banco* decision as well as with the decision in the *Pons* case.

The court of appeals overlooked that the expropriation decree against the respondent only applied to Cuban nationals. On the other hand, the expropriation decree which was held invalid in *Banco* applied only to the property and enterprises of United States nationals or to operators of enterprises in which United States nationals had an interest or participation, and was adopted in retaliation against the United States for reducing the sugar quota allotted to Cuba.

No American court, other than the court of appeals, has assumed jurisdiction to look into or pass upon the validity of acts of the Castro Government in expropriating in Cuba property situated there and belonging to Cuban nationals or to enterprises organized under Cuban laws in which Cuban nationals have the predominant interest.

The court of appeals also erroneously decided, based upon the *Banco* decision, that the State Department had expressed the conclusion that our courts are not restrained from adjudicating the effect of the expropriation decrees of the Castro Government in Cuba.

B. There has been no statement issued by the State Department that it has no objection to American courts sitting in judgment on expropriation decrees of the Castro Government.

In *Banco Nacional de Cuba v. Sabbatino*, *supra*, at p. 858, the court assumed that it had a letter from the State Department of the type issued in connection with the *Bernstein* litigation, *supra*.

The court of appeals, in the case at bar, decided that consistently, repeatedly and concurrently the State Department has expressed its conclusion that our courts are not restrained from adjudicating the effect of the expropriation decrees of the Castro Government. The court of appeals was so sure of the accuracy of its decision in this regard that, although it recognized that in the record before it there was no expression of any kind from the State Department, it said it felt that it could rely upon its conclusion without the necessity of a formal enunciation in each and every case. The fact of the matter is, however, that the court of appeals in the case at bar and the court which decided the *Banco* case both erroneously assumed that the State Department had stated that it had no objection to American courts sitting in judgment on Cuban expropriation decrees.

In Case No. 403, now pending in this Court, a petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit has been filed by *Banco Nacional de Cuba*, as petitioner, versus *Peter L.*

Sabbatino, as Receiver, et al, as respondents. In that proceeding, this Court, by its order dated November 20, 1962, invited the Solicitor General to express the views of the United States.

Thereafter, the Solicitor General filed a Memorandum for the United States. A copy of the same, sans exhibits, is printed in App. E, pp. 37-46, *infra.*

It clearly appears from the government's memorandum that there has been no expression by the State Department that it had no objection to the courts of this country sitting in judgment on the expropriation decrees of the Cuban Government affecting property in Cuba (App. E, pp. 42-46, *infra*). The most that representatives of the State Department have done is to refuse to express an opinion upon whether the Cuban nationalizations should be given effect in the courts either because of the Act of State doctrine or for any other reason or to make a statement of "no comment" (App. E, p. 46).

It, therefore, appears that the decision of the court of appeals with respect to the Act of State doctrine was based upon a false premise and should be reviewed.

3. In stating that this case is companionable with Case No. 19130, *Pedro Menendez Rodriguez v. Pan-American Life Insurance Company and Maria Cristina Vento Jaime v. Pan-American Life Insurance Company,* that their component parts are identical in many respects and that the ultimate determination of the two appeals rests upon the same foundation, the court of appeals overlooked and failed to consider the differences in vital facts and circumstances between the two appeals. The petitioner submits that the reasons given by the court of appeals for reversing Case No. 19130 are wholly inapplicable in the case at bar.

CONCLUSION

For the foregoing reasons, it respectfully is submitted that this petition for a writ of certiorari should be granted.

DATED at Tampa, Florida, February 5, 1963.

Respectfully submitted,

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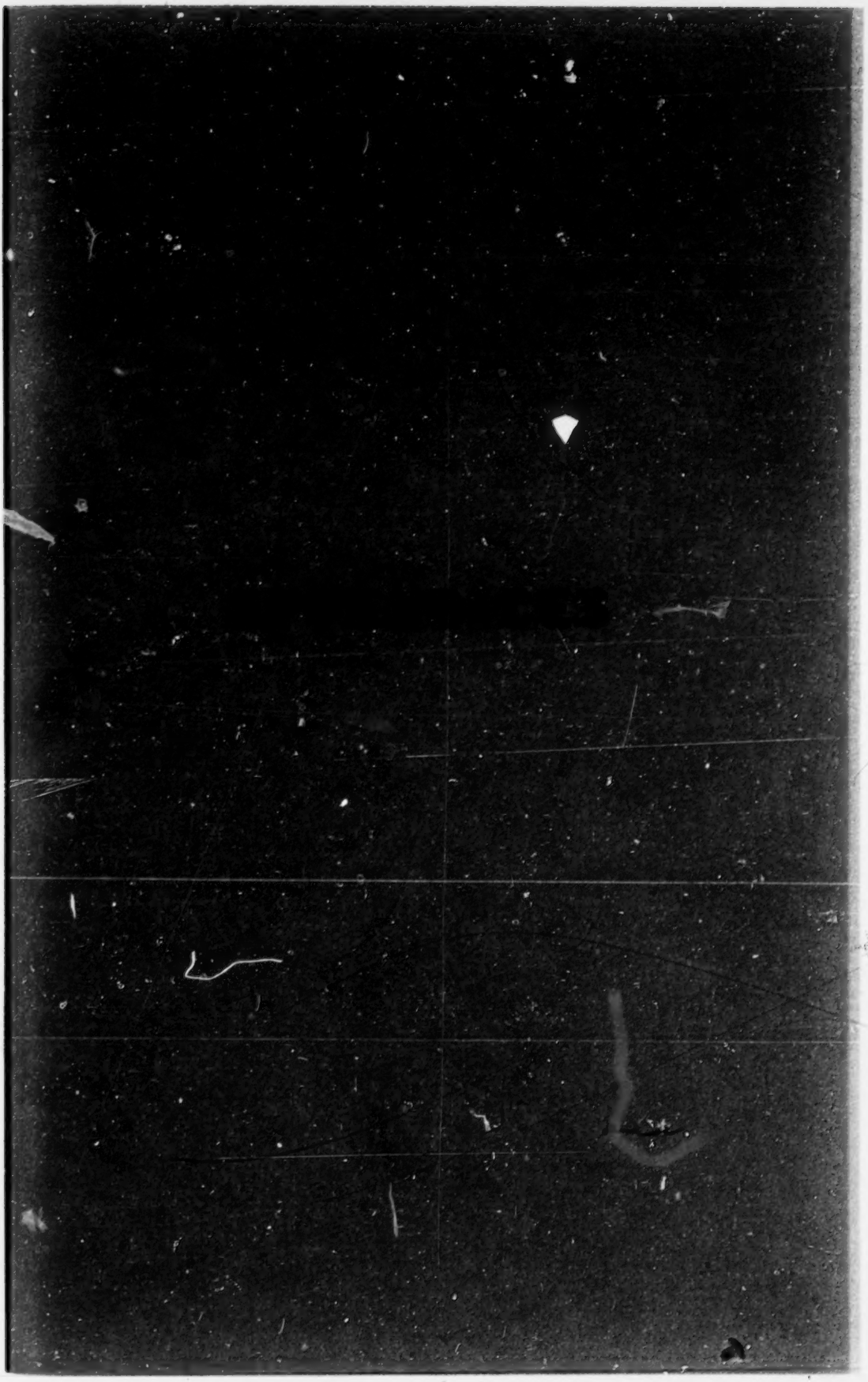

APPENDIX A

Judgment Below

IN THE

District Court of the United States

IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA.
TAMPA DIVISION

No. 3932—Civil T

PEDRO MENENDEZ

Plaintiff,

versus

AETNA INSURANCE COMPANY

Defendant.

FINAL JUDGMENT

The cause came on to be heard upon the motion to dismiss filed herein by the defendant, Aetna Insurance Company of Hartford, Conn., and, after considering the pleadings and affidavit filed herein and the oral arguments and briefs submitted by counsel for the respective parties, the Court finds as follows:

A. The plaintiff, Pedro Menendez, is a citizen of the Republic of Cuba, who is and since about January, 1959, has been residing in the State of Florida.

B. The defendant, Aetna Insurance Company of Hartford, Conn., is a corporation organized and existing under the laws of the State of Connecticut, and at all times material herein the defendant was qualified to do business and did business in the Republic of Cuba.

C. All of the transactions, occurrences and matters involved in this suit took place in the Republic of Cuba, and the issues involved in this action are governed and controlled by the laws, decrees, declarations and proclamations of the Republic of Cuba.

D. The plaintiff's claim did not accrue within the jurisdiction of this Court, and the subject matter of this suit has no connection with or relationship to the United States or the latter's citizens who reside within the jurisdiction of this Court.

E. The docket of this Court is crowded, and to permit this suit to be prosecuted would burden this Court unnecessarily with difficult and complicated litigation.

F. For the convenience of parties and witnesses and in the interest of justice, the plaintiff's claim best could be litigated and disposed of in the Republic of Cuba.

G. For the reasons hereinbefore stated, among others, this action should be dismissed on the ground of forum non conveniens.

It, therefore, is ORDERED and ADJUDGED as follows:

1. That the complaint of the plaintiff, Pedro Menendez, and this action against the defendant, Aetna Insurance Company of Hartford, Conn., be and the same hereby are dismissed, without prejudice, however, to the right of the plaintiff to institute an action on his claim against the defendant in any other appropriate court.

2. That the defendant, Aetna Insurance Company of Hartford, Conn., do have and recover of and from the plaintiff, Pedro Menendez, its costs incurred herein as follows:

Clerk's filing fee	$15.00
Premium on removal bond	10.00
Total costs	$25.00

for the amount of which costs let execution issue.

3. That the removal bond heretofore filed herein by the defendant, wherein the defendant is principal and the Aetna Casualty and Surety Company is surety, be and the same hereby is canceled, and that said principal and surety may be and they hereby are released and discharged from any and all liability in connection with said removal bond.

DONE and ORDERED at Tampa, Florida, this 22 day of May, 1961.

/s/ GEORGE W. WHITEHURST

UNITED STATES DISTRICT JUDGE

United States Court of Appeals
FOR THE FIFTH CIRCUIT

October Term, 1961

No. 19,139

D. C. Docket No. 3932 Civil T

PEDRO MENENDEZ,
Appellant,

versus

AETNA INSURANCE COMPANY,
Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before CAMERON and BELL, Circuit Judges, and CARSWELL, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with directions for further proceedings not inconsistent with the opinion of this Court in Pedro Menendez Rodriguez vs. Pan American Life Insurance Company — Maria Christina Vento Jaime vs. Pan American Life Insurance Company, No. 19130;

It is further ordered and adjudged that the appellee, Aetna Insurance Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Cameron, Circuit Judge, Concurs in the Result"

October 17, 1962

Issued:

Recoverable Costs:

Docketing cause, etc. $25.00

APPENDIX B

Opinion Below

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19139

PEDRO MENENDEZ,

Appellant,

versus

AETNA INSURANCE COMPANY,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(October 17, 1962)

Before CAMERON and BELL, Circuit Judges, and CARSWELL, District Judge.

PER CURIAM: We conclude from a careful review of the entire record that the District Court's dismissal of the complaint must be reversed for the reasons stated in our opinion of this date in the case of *Pedro Menendez Rodriguez v. Pan American Life Insurance Company and Maria Christina Vento Jaime v. Pan American Life Insurance Company.*

The residual questions of law in this case not specifically dealt with in our opinion above are more properly determinable by the District Court upon full hearing on the merits.

This cause is reversed and remanded with directions for further proceedings not inconsistent with our opinion in the *Rodriguez* case.

REVERSED AND REMANDED for further proceedings.

CAMERON, Circuit Judge:

I concur in the result.

Opinion in Companion Case

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19130

PEDRO MENENDEZ RODRIGUEZ

Appellant,

versus

PAN AMERICAN LIFE INSURANCE COMPANY,

Appellee.

MARIA CHRISTINA VENTO JAIME,

Appellant,

versus

PAN AMERICAN LIFE INSURANCE COMPANY,

Appellee.

Appeals from the United States District Court for the Southern District of Florida.

(October 17, 1962)

Before CAMERON and BELL, Circuit Judges, and CARSWELL, District Judge.

CARSWELL, District Judge: This case is companionable with two others also decided this date: No. 19139, *Pedro Menendez v. Aetna Insurance Company*, and No. 19101, *Tabacalera Severiano Jorge S.A. v. Standard Cigar Company.*

Their component parts are identical in many respects, and the ultimate determination made here rests upon the same foundation. All three cases were originated by Cuban nationals who have fled from the regime of Fidel Castro and seek redress in the courts of the United States for monies claimed due them under contracts with the respective original defendants. All of the named defendants are corporations organized and existing under the laws of one or another State of the United States. The jurisdictional power of the United States District Court to try these cases is not questioned. There is diversity of citizenship between the parties and all essentials of Title 28, United States Code, Section 1332, are met in each case. All three of the complaints were dismissed by the District Court on the classic doctrine of *forum non conveniens* in virtually identical orders granting virtually identical motions filed by the respective defendants.

We conclude that the dismissal of each of these complaints on this ground was erroneous. Our review cannot there end but must encompass other grounds asserted in support of the motions to dismiss.

In this particular appeal we have consolidated the separate cases of Pedro Menendez Rodriguez and Maria Christina Vento Jaime, appellants, against Pan American Life Insurance Company, appellee.

These suits were originally commenced in the Circuit Court of Hillsborough County, Florida, and defendant, a Louisiana corporation, removed this action to the United States District Court on the basis of diversity of citizenship. The plaintiffs sought declaratory decree that they were entitled to receive the cash surrender value of certain insurance policies issued by Pan American Life Insurance Company, appellee.

The complaints allege that on January 5, 1945 Pan American insured the lives of the plaintiffs in the amount of $20,000 each. The policies provided for an annual premium of $1,523.40 to be paid by each of the plaintiffs for twenty years. The policies were accepted by the defendant in New Orleans, Louisiana, and contained, among other provisions, the following: "All the payments relative to this policy be they on the part of the company or the insured will be verified in the City of New Orleans in the legal money of the United States." Another provision: "This policy is exempt from any restrictions as to residence, travel, or occupation." The policies contained provisions for automatic premium loans in the event of failure to make premium payments, and provisions for the surrender of the policy for its cash value.

The premiums were paid each year from January 5, 1945 through January 1958. The January 5, 1959 premiums were not paid and the automatic loan provisions came into effect. On September 23, 1959 Rodriguez paid to Neal Harrison, an agent for defendant in Tampa, Florida, $2,941.47 to apply against the premium loans which were due on January 5, 1959. Harrison accepted the check, and forwarded it to the defendant in Louisi-

ana. On October 6, 1959 the check was returned by the defendant, and payment refused. In July, 1960 plaintiffs demanded the cash value of the policies in Tampa and were refused. Plaintiffs were advised to make the premium payment in Cuba, and apply for their cash surrender value there. From January 5, 1945 until January 5, 1952 payments had been made in currency of the United States, in accordance with the terms and conditions of the policies. In April, 1951 the Cuban government under Batista decreed that all obligations due citizens of Cuba be paid in Cuban pesos, and all obligations incurred by Cubans were likewise to be paid in Cuban pesos. The policies contain a provision that the contract cannot be changed or modified except with the written consent of the defendant, and signed by the president, vice president, secretary or actuary. Neither the president, vice president, secretary or actuary ever executed written consent to any change or modification of the insuring agreement. Nevertheless, from January 1952 until January 1958 plaintiffs paid, and defendants accepted, payment of premiums in Cuban pesos.

After Pan American caused this action to be removed, it filed its answer and a motion to dismiss. In support of its motion, defendant urged that since the applications of insurance were executed in Cuba, and since the policies were delivered in Cuba, and the premiums paid in Cuba, therefore, all rights which plaintiffs claim are governed by the laws of Cuba. The argument concludes, therefore, that the United States District Court should abstain from exercising its jurisdiction.

In its answer, defendant denied that the subject matter of this suit was within the jurisdiction of the federal court, and claimed that this controversy is justiciable solely under the laws of Cuba and in the courts of Cuba.

Defendant claims that the laws of Cuba prohibited it from accepting the premium in Tampa, Florida, in the currency of the United States, and that it was prohibited by Cuban law from paying the cash value of the policies to plaintiffs. In addition, defendant claimed that due to the decree of confiscation, plaintiffs were no longer the owners of the policies, and were no longer entitled to receive the cash surrender value of the policies. The decree of confiscation was issued on April 7, 1959 by the government of Cuba, by mere publication of the names of those persons whose property was declared to be confiscated.

The attorney for defendant, by affidavit, averred that demand for payment was made by the Cuban government on defendant on September 20, 1960.

The District Court dismissed plaintiffs' complaints under the doctrine of *forum non conveniens* stating: The plaintiffs are citizens of Cuba, defendant is a United States corporation incorporated in Louisiana, and doing business in Florida; all the transactions took place in Cuba, and are, therefore, governed by Cuban law; the claim did not accrue within the jurisdiction of the court; the docket is crowded, and it would be a burden on the court to litigate the difficult legal questions which arise; for the convenience of the witnesses, and parties, and in the interest of justice; and for other reasons (not mentioned) the action was dismissed on the grounds of *forum non conveniens*.

It is noted that all events and declarations of the Cuban government occurred after plaintiffs had established residence in Tampa, Florida.

The dismissal of these complaints on the ground of *forum non conveniens* cannot be upheld.

It is perhaps well at the outset to note that we are *not* dealing here with the *transfer* of an action from one federal court to another. The Judicial Code (Title 28, United States Code) in Section 1404(a) has set up standards and procedures whereby one federal court may properly transfer an action to a more convenient federal forum where the action "might have been brought."

We are not here concerned with the delineation given by the courts to Section 1404(a), but we are concerned with the remnants of that statute's historical progenitor, the equitable tradition of *forum non conveniens*. The applicability of the doctrine in our court system has been greatly restricted. As Professor Wright has recently commented,

> "The doctrine of forum non conveniens has only a limited continuing vitality in federal courts. Section 1404(a) of the Judicial Code has replaced the doctrine whenever the more convenient tribunal is another federal court where the action 'might have been brought.' Where, however, there is no alternative federal forum, dismissal on the grounds of forum non conveniens is still permissible. In admiralty cases in particular it frequently happens that the more convenient forum is in a foreign country, and dismissal will then be ordered." 1 Barron & Holtzoff, Federal Practice and Procedure § 87, pp. 442-443 (Wright ed. 1960).

Forum non conveniens, as an equitable proposition, is

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still available to the federal courts, despite its clear limitation, where the state court or the court of a foreign country is the alternative forum. See *Venue in the Federal Courts — The Problem of the Inconvenient Forum,* 15 U. Miami L. Rev. 237, 239 (1961); *Glicken v. Bradford,* 204 F. Supp. 300, 304 (S.D. N.Y. 1962).

In the instant case the District Court thus applied the doctrine under the theory that the courts of Cuba were open as an alternative. This we must reject, not upon grounds of abuse of discretion by the court in the employment of a traditionally equitable doctrine, but because we see it as an erroneous application of law to the established facts. There is a clear distinction between the review of transfer orders under 28 U.S.C. § 1404(a), which are interlocutory, and, therefore, reviewable rarely, if at all, and orders of dismissal which being final, are appealable as of right.[1]

The facts here are that Pan American removed, as a matter of right under the diversity statute, cause of action from the initial forum chosen by plaintiffs. The plaintiffs have vigorously sought hearing in the jurisdiction invoked by defendants themselves. The burden to establish good cause for dismissal is quite plainly upon the defendant, and it is still true that "unless the balance is strongly in favor of defendant, the plaintiff's choice of forum should rarely be disturbed." *Gulf Oil*

[1] See 1 Barron & Holtzoff, Federal Practice and Procedure § 86.7 (Wright ed. 1960). See also Chief Judge Tuttle's discussion of scope of review in *Motor Distributors, Ltd. v. Olaf Pedersen's Rederi A/S,* 239 F. 2d 463, 466 (5th Cir. 1956). It is noteworthy that in *North Branch Products, Inc. v. Fisher,* 284 F. 2d 611 (D.C. Cir. 1960), the appellate court reversed the dismissal without even discussing whether any deference need be paid to the trial judge's exercise of discretion.

Corp. v. Gilbert, 330 U.S. 501, 508 (1947). In this same case the Supreme Court said on pages 506, 507: "In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them."

Following this reasoning, Judge Holmes expressed for this Court in 1948 the view that "At least two such forums must be open to the plaintiff before the doctrine comes into play; and they shall not be dependent merely upon the will or grace of the defendant, but must be provided by law." *Tivoli Realty, Inc. v. Interstate Circuit, Inc., et al.*, 167 F. 2d 155 at 156, 157.

In 1885 the Supreme Court held that the trial courts have jurisdiction even of a suit between two foreigners "and that they will exercise it unless special circumstances exist to show *that justice would be better served by declining it.*" *The Belgenland*, 114 U.S. 355, 367 (1885). (Emphasis added). In 1956 Judge Tuttle, speaking for this court reversed a district court which had dismissed in favor of a foreign court, saying: "Instead of the rule being, as the trial court here stated, that jurisdiction should be denied unless such denial would work an injustice, the rule is, rather, that jurisdiction should be taken unless to do so would work an injustice." *Motor Distributors, Ltd. v. Olaf Pedersen's Rederi A/S*, 239 F. 2d 463, 465, (5th Cir. 1956). This year a district court observed that *forum non conveniens* "is a harsh rule, and is applied in rather rare cases . . . " *Glicken v. Bradford*, supra.

Defendant, under this test, must show that these plaintiffs, refugees from Castro's Cuba, can obtain

justice in the courts of Cuba. The law does not impose upon these Cuban refugees, any more than any other plaintiff, the burden of proving that they would have problems of health or legal difficulties in obtaining justice in the courts of Cuba. By like token, we need not and do not embark upon a international sea of judicial notice of the treatment of those who flee their native land and return to Castro's jurisdiction to contest their property rights with a Louisiana corporation.

A recent case from the Court of Appeals for the District of Columbia is close in point. *North Branch Products, Inc. v. Fisher,* 284 F. 2d 611 (CA DC 1960), cert. den. 365 U.S. 827. There the district court had dismissed an action on the ground that either a Michigan state court or a court in Canada would be a more convenient forum. This was reversed, the appellate court finding that the jurisdiction of a defendant would not be obtained in Michigan and said there was no certainty that a Canadian court would assume jurisdiction of the action. The court cited *Gulf Oil Corp. v. Gilbert, supra,* as authority for the proposition that there must be a clear showing that an alternative forum exists. It was held erroneous to dismiss in the absence of such clear showing.

There is no such showing on the record before us. The District Court's ruling dismissal on grounds that Cuba would be a more convenient forum was error because the standards discussed here were improperly applied to the established facts.

Appellant contends, however, that since it is a Louisiana corporation, the plaintiffs also have available as an alternative forum the courts of that state, and, therefore, the doctrine of *forum non conveniens* was properly invoked by the District Court though the order spoke in terms of more convenience in Cuba. This, it says, is basis enough, under established appellate rules, to sustain the dismissal. Assuming this to be so, arguendo, we still do not find anything suggested by this record that the case would be *more* conveniently tried in the Louisiana courts or anywhere other than the Tampa division of the United States District Court for the Southern District of Florida. The same burden of clear showing in this record is borne by the defendant, and this it has not carried. Indeed, we think it appropriate to note that should this defendant prevail on this dismissal, there is no assurance that a whole new round of jurisdictional jousting would not be open to invitation. If plaintiffs be required to go now to the Louisiana courts it is not illogical to assume that defendant could there, once again, invoke the doctrine of *forum non conveniens* on the ground that the Florida Courts would be convenient. That is where the plaintiffs started, but still no court would have touched the merits of the claim. Their quest for legal determination of their rights under contract with defendant should be answered.

As we observed in the beginning, transfers to other federal courts are quick and ready tools for our trial courts under 28 U.S.C. § 1404(a). But whether it be by transfer order under the statute or by dismissal order under the doctrine of *forum non conveniens* the plain-

tiff's privilege to choose, or not be ousted from, his chosen forum is highly esteemed.[2]

A second and even more crucial issue is raised on these motions to dismiss. Although not specifically mentioned in the District Court's findings upon which its dismissal orders were based, running through each record is the contention of appellees that the merits of appellants' respective claims, for one reason or another, are controlled by the law of Cuba. In each case it is urged that the confiscatory and other decrees of the Castro government are binding, that appellants' rights, if any, have been expropriated by Castro; that they have no standing in court as proper parties; that appellees are faced with the prospect of having to pay various officials of Castro's government the monies claimed by the appellees.

All of these contentions and others of similar vein, bring into consideration most sensitive questions of relationship of the government of Cuba, officially recognized by our government, to the United States, and the relationship of the executive branch of our government to the judicial.

Appellees urge that their showing on these points is adequate to support dismissal either as an adjunct of the *forum non conveniens* doctrine or as a separate and distinct proposition asserted in the name of the Act of State doctrine.

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[2]See 1 Barron & Holtzoff, Federal Practice and Procedure (Wright ed. 1960) § 86.3. The defendant's burden is to go to another existing forum and that this is actually so and not merely theoretically.

Despite some difficulty in forming a terse definition of the Act of State doctrine it is clear that both it and the doctrine of *forum non conveniens* have their origin in the broader concept of judicial self-restraint.

In essence the Act of State doctrine holds that American courts will not look into or pass upon the validity of the acts of foreign governments performed in their capacities as sovereigns within their own territories.[3]

It is not a rule of international law but is instead a rule of the conflict of laws.

The Supreme Court first clearly recognized the doctrine in *Underhill v. Hernandez,* 168 U.S. 250 (1897). There it was said on page 252:

> "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves."

The development of the doctrine by the Supreme Court through the years has been reviewed in considerable detail recently by the Court of Appeals, Second Circuit, in a lucid and well reasoned opinion which we

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[3]An able discussion of the Act of State doctrine appears in the publication "International Law in National Courts", Proceedings of the Third Summer Conference in International Law, Cornell Law School, June 1960.

conclude should be dispositive of the issues raised by the subject litigation before this court. On July 6, 1962, Judge Waterman spoke for the Second Circuit, in *Banco Nacional de Cuba v. Sabbatino, et al.*, — F. 2d —, (CA 2nd Cir.) (Docket No. 27268) and there considered various exceptions to the Act of State doctrine. In *Banco v. Sabbatino* the court had under review a district court's summary judgment dismissing a complaint filed by the financial agent of the Cuban government against a New York state receiver who was holding proceeds of a shipment of sugar and other defendants as brokers who negotiated its sale in this country.

Fully cognizant of the sensitivity of the Court's role and carefully containing its sweep, the Court affirmed the dismissal of the complaint on summary judgment. We quote rather copiously from this opinion for it states well the basis for our determination that these complaints cannot be dismissed on the Act of State doctrine.

> " . . . when the executive branch of our Government announces that it does not oppose inquiry by American courts into the legality of foreign acts, an exception to the judicial abnegation required by the act of state doctrine has arisen and has been recognized both in this circuit and elsewhere. In *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F. 2d 375 (2 Cir. 1954) (*per curiam*), when we received word from the State Department that it was State Department policy to permit American courts to pass on the validity of acts done by Nazi officials, our court rescinded its earlier mandate based upon the act of state doctrine, preventing the district court

from questioning the validity of the acts of the German Nazi government. (Citing cases[4])

"This exception is applicable to the case before us. While the case has been pending we have been enlightened, as the Court was in the *Bernstein* case, *supra*, as to the attitude of the Department of State. In a letter, dated October 18, 1961, addressed to counsel for the *amici* in this case, the Legal Adviser to the State Department asserted:

> 'The Department of State has not, in the *Bahia de Nipe* case or elsewhere, done anything inconsistent with the position taken on the Cuban nationalization by Secretary Herter. *Whether or not these nationalizations will in the future be given effect in the United States is, of course, for the courts to determine.* Since the *Sabbatino* case and other similar cases are at present before the courts, any comments on this question by the Department of State would be out of place at this time. As you yourself point out, statements by the executive branch are highly susceptible of misconstruction.' (Emphasis added.)

[4]See 173 F. 2d 71 (2 Cir. 1949). See also *Bernstein* v. *Van Heyghen Freres, S.A.*, 163 F. 2d 246, 252 (2 Cir.), cert. denied, 332 U. S. 772 (1947); Restatement, Foreign Relations Law of the United States § 44 (Proposed Official Draft, 1962); *Kane* v. *National Institute of Agrarian Reform*, No. 61 L. 730, June 8, 1961 (Fla. Cir. Ct.) [18 Fla. Supp. 116]; Association of the Bar of the City of New York, Committee on International Law, *Report, A Reconsideration of the Act of State Doctrine in United States Courts* 13 (May 1959); Zander, *The Act of State Doctrine*, 53 Am. J. Int'l L. 826 (1959).

"In a subsequent letter, dated November 14, 1961, the Under Secretary of State for Economic Affairs stated:

> 'I have carefully considered your letter and have discussed it with the Legal Advisor. Our conclusion, in which the Secretary concurs, is that the Department should not comment on matters pending before the courts.'

"On April 13, 1961, the State Department told the litigants in *Kane v. National Institute of Agrarian Reform*, No. 61 L. 730, (Fla. Cir. Ct.) (1961), a case that involved another confiscation by the Castro Cuban government of American-owned property in Cuba: 'Effect in U.S. of Decrees, etc. of Castro regime is question for court in which case heard.' These statements are somewhat ambiguous, perhaps intentionally so. But at the least they express a belief on the part of those responsible for the conduct of our foreign affairs that the courts here should decide the status here of Cuban decrees. Of course, if there is no good reason for abstention, a court should recognize and accept its fundamental responsibility to decide a case before it in accordance with whatever substantive norms may be relevant; and when, as here, the State Department is willing for the court to adjudicate the rights of the parties, one of the basic reasons for the act of state doctrine — the danger that independent judicial decisions might interfere with this country's foreign relations — is inapplicable to support abstention. The broad statements in

cases such as *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918) and *Shapleigh v. Mier*, 299 U.S. 468 (1937) could not have been intended by the Supreme Court to require a judicial avoidance of judicial responsibility in a case where the State Department has expressed a lack of concern as to the outcome of the litigation.

"But even though we perceive no danger to American foreign policy from a determination by an American court of the merits of this litigation presently before us, perhaps there is some other ground that compels us to accept without question the validity of the Cuban decree here involved."

The court then proceeded to examine the Cuban decrees involved and its ultimate conclusion was to the effect that they were confiscatory and without standing in our courts.

In these cases there are dismissal orders under review while in *Banco* there was a full review on the merits of summary judgment. There are also certain rather obvious factual distinctions in *Banco* and these cases under consideration here. But the legal principles enunciated are fully applicable. In *Banco* the action was brought by the Castro government's financial agent who sought to invoke Cuban decrees, found confiscatory in nature, to recover from New York defendants. Here we have Cuban nationals as plaintiffs seeking determination of their rights under contract with citizens of this country. The corporate defendants here, in effect, invoke as a bar to this litigation the decrees of Castro which would have the effect of erasing any rights of plaintiffs to monies which might be due them under contracts with American citizens. The point of convergence of these cases is clear: Our courts are not

compelled by the Act of State doctrine to give force and effect to the decrees of the Castro government in Cuba. On the merits it was determined in *Banco* that the subject Cuban decrees were confiscatory and their effect was nullified by the trial court, which was affirmed on appeal.

It is for the District Court to determine upon development of all the facts, by summary judgment or otherwise, whether the Cuban decrees are confiscatory or whether the particular decrees are otherwise violative of fundamental concepts of justice and, therefore, without status, in these particular cases.

If such decrees are found wanting by these standards it follows that they will not be given force and effect in our courts. The attempted enforcement of such decrees by the Cuban agent against American citizens was denied in *Banco*, and it matters not whether the thrust of those decrees be directed against Cuban nationals or American citizens. The American appellee corporation here is certainly no more subject to such decrees than others, and, as in *Banco*, is fully protected from confiscatory effect within the limit of the power of our courts. The action of the Cuban agent was dismissed in the *Banco* case, and for the same reasons we reverse the dismissal of the complaints here.

It is noted that, unlike the Second Circuit in the *Banco* case, we do not have in the records before us an expression of any kind from the State Department. None has been requested. With the fullest cognizance of the responsibility of the executive branch in the field of foreign relationships, we do not perceive any necessity for formal comment by the State Department about these cases.

Consistently, repeatedly and currently, the State Department has expressed its conclusion that our courts are not restrained from adjudicating the effect of the decrees of the Castro government in Cuba. This has now been made so clear we feel full reliance by the courts upon such expressions may be made without the necessity of a formal enunciation in each and every such case. Indeed, the wisdom of requesting another, and yet another, statement on the identical subject seems quite doubtful. It is specifically noted that there was judicial response to the executive branch's change in approach in *Bernstein v. Van Heyghen Freres, S.A.*, supra.

The other grounds asserted in support of these orders of dismissal have been considered and we find none of them, alone or together, sufficient. The crowded condition of the trial docket, the difficulty in determining applicable law in the construction of the contract, for example, are not reason enough to deny adjudication on the merits in view of our treatment here of the two broader issues. Residual issues raised on the present status of the pleadings are properly determinable by the District Court on the merits.

The orders dismissing the complaints are reversed and the causes remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

CAMERON, Circuit Judge:

I concur in the result.

APPENDIX C

OPINION DENYING REHEARING

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19139

PEDRO MENENDEZ,

Appellant,

versus

AETNA INSURANCE COMPANY,

Appellee.

On Appeal from the United States District Court for the Southern District of Florida.

(December 20, 1962)

ON PETITION FOR REHEARING

Before CAMERON and BELL, Circuit Judges, and CARSWELL, District Judge.

PER CURIAM: The factual distinctions between this case and *Rodriguez v. Pan American Life Insurance Company, etc.*, __ F. 2d __, Case No. 19130, decided October 17, 1962, referred to by appellee in its petition for rehearing do not require a different application of law. For this reason, and for the reasons stated in denial of petition for rehearing this date in the case of *Rodriguez v. Pan American Life Insurance Company, etc.*, supra, this petition for rehearing is

DENIED.

Opinion Denying Rehearing in Companion Case

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19130

PEDRO MENENDEZ RODRIGUEZ,
Appellant,

versus

PAN AMERICAN LIFE INSURANCE COMPANY,
Appellee.

MARIA CHRISTINA VENTO JAIME,
Appellant,

versus

PAN AMERICAN LIFE INSURANCE COMPANY,
Appellee.

On Appeal from the United States District Court for the Southern District of Florida.

(December 20, 1962)

PETITION FOR REHEARING

Before CAMERON and BELL, Circuit Judges, and CARSWELL, District Judge.

PER CURIAM: In reversing the dismissal of this complaint, and remanding for further proceedings, we noted then, and repeat now, that residual issues raised on the present status of the pleadings are properly determinable by the District Court on the merits. We carefully considered and reviewed the argument of appellee that the doctrine of *forum non conveniens* or Act of State doctrine, one or the other, barred further litigation. Our review of that holding in the light of the reiterated contentions of appellee in this petition does not require further hearing.

Appellee further suggests here that the Bretton Woods Agreement and certain Cuban currency control statutes require dismissal of this complaint. Since the entry of our opinion in this case this Court has on November 7, 1962 rejected this contention in *Pan American Life Insurance Company v. Inocencio Blanco*, No. 19569.

The petition for rehearing is

DENIED.

APPENDIX D

Statutes Involved

Decree No. 1384, of April 9, 1951

"WHEREAS, Law No. 13, of December 23, 1948 provided that the currency of the United States of American shall cease to be legal tender and to have debt redeeming force in the territory of the Nation one year after the date on which the 'Banco Nacional de Cuba' (National Bank of Cuba) commenced operating, unless the Chief Executive, on the recommendation of said Bank, should extend that period for another period not exceeding one year. And,

WHEREAS, the above mentioned authority to extend for one year the status of legal tender and debt redeeming force of the United States currency in the national territory ought to be construed to cover the possibility of extending said period for a shorter additional period, and to provide for its expiration in such a way that the effects of one and the other provision will not extend beyond said additional one year period. And,

WHEREAS, the 'Banco Nacional de Cuba' commenced operating on the 27th day of April, 1950, and then, within the first one year period allowed by said Law No. 13, of December 23, 1948, the Board of Directors thereof requested this Chief Executive to extend the status of legal tender and debt redeeming force of the United States currency in the national territory until June 30, 1951. And,

WHEREAS, the Board of Directors of said 'Banco Nacional de Cuba' has further recommended to this Chief Executive the adoption of certain supplementary regulations in connection with the cessation of said legal tender status and debt redeeming force on June 30, 1951.

NOW, THEREFORE: In pursuance of the powers vested in me by the Constitution and other statutes of the Republic, on the recommendation of the 'Banco Nacional de Cuba', as endorsed by the Minister of the Treasury, and with the approval of the Council of Ministers, I hereby,

RESOLVE:

First: To extend the status of legal tender and debt redeeming force of the currency of the United States of America in the territory of the Nation until the thirtieth day of June of the current year. Second: Beginning on the date on which the United States currency shall cease to be legal tender and have debt redeeming force in the territory of the Nation, all obligations contracted or payable in the national territory shall be expressed and settled in national currency pursuant to the provisions of Law No. 13, of December 23, 1948, subject to no exception other than those specified in Articles 96, 98 and 113 thereof. The debtors of obligations not included in said exceptions and the payment whereof in United States currency has been stipulated or agreed upon prior to the cessation of such legal tender status and such debt redeeming force, may settle such obligations at par through delivery of national currency in the same amounts as those previously expressed in United States dollars.

Third: Upon the cessation of the status of legal tender and debt redeeming force of the United States currency, all bank deposits theretofore kept under such denomination shall be subject to the provision contained in Article 98 of Law No. 13, of December 23, 1948, which shall be applied in accordance with the following rules:

(a) Banks may continue accepting and keeping deposits in United States currency and in any other foreign currency, but adhering to the provisions of this Decree and of Article 113 of Law No. 13 of December 23, 1948.

(b) All withdrawals of funds shall be made by means of non-transferable and non-negotiable documents drawn in accordance with the following form:

Non-transferable Non-negotiable

(Name of the Bank)

Account No. .....

(Place and date)

Please pay to myself the sum of .....

/100 Dollars and charge same to my account in United States Currency.

$ .....

(Signature of Depositor)

(c) If the Bank should choose, pursuant to the above-mentioned Article 98 of Law No. 13, of December 23, 1948, to pay in United States banknotes the withdrawals from bank deposits kept under the

denominations of United States currency, such payments shall be made without deducting any expenses, commissions or premiums at the expense of the depositor, who shall be entitled to the free disposition and possession of said currency; and,

(d) If the bank should choose to pay either in dollar drafts on New York or in national currency at the then current exchange rate, the election between one and the other form of payment under said Article 98 of Law No. 13 of December 23, 1948 shall be a privilege of the depositor, who by requesting the payment in a dollar draft shall be deemed to assume the customary transfer expenses and taxes.

Fourth: The 'Banco Nacional de Cuba' is hereby directed to attend to the enforcement of this Decree, and to adopt whatever additional regulations may prove necessary.

Done at the Presidential Palace in Havana this 9th day of April, the year 1951.

CARLOS PRIO SCARRAS
President

Felix Lancis
Prime Minister
Jose R. Alvarez
Minister of the Treasury

(Official Gazette "92, of April 20, 1951)"

Law No. 568, of September 29, 1959

"Article 1.—For the purposes of this law, the following are considered felonies of monetary, contraband. . . . (6) To export currency or securities, or to transfer funds to points abroad by means of checks, transfers, drafts, letter-orders, orders of payment, compensations, travellers' checks, letters of credit, reimbursements of collections, purchases or sales of passage tickets or through any other similar means, regardless of the origin or source of the funds, except for those cases authorized by the Currency Stabilization Fund, through a member bank or a firm duly authorized by Banco Nacional de Cuba.

. . . . . (10) To receive and credit to bank accounts kept abroad, or to transfer to third parties collections made abroad for business transactions or services rendered in Cuba, regardless of the source or origin of the respective funds.

Article 2.—The persons guilty of the felony of currency contraband referred to in the preceding article shall be liable to a penalty of imprisonment for from 6 months and 1 day to 3 years, or a fine of one to two thousand quotas, or both.

Article 3. a) Any person who sells or in any way assigns, transfers, or transmits currency, checks, drafts, orders of payment, travellers' checks or any similar paper in foreign currency shall be liable to imprisonment for from 6 months and 1 day to 3 years, or to a fine of one to two thousand quotas, or both.

Article 6— . . . . . The Currency Stabilization Fund is expressly authorized to order the intervention of any company, business or entity which is presumed to have infringed the provisions of this law."

Law No. 151, of March 17, 1951

Artículo Primero: La Ley número 112 de 27 de febrero de 1959, publicada en la GACETA OFICIAL de fecha 4 de marzo del propio año, quedará redactada como sigue:

"Art. 1.–Se dispone la confiscación y consecuente adjudicación al Estado Cubano, de todos los bienes que integren el patrimonio del Tirano Fulgencio Batista y Zaldivar.

Art. 2.–Se dispone la confiscación y consecuente adjudicación al Estado Cubano, de todos los bienes que integren el patrimonio de quien ostentó provisionalmente el cargo de Presidente de la República durante la Tiranía.

Art. 3.–Se dispone la confiscación y consecuente adjudicación al Estado Cubano, en la cuantía y forma que se expresa en la presente Ley, de bienes de las personas que, como colaboradores del Tirano, se relacionan a continuación:

a) La persona electa en la farsa electoral de 1954 para el cargo de Vicepresidente de la República.

b) Todos los oficiales de las Fuerzas Armadas de la República que participaron directamente en la ejecución del golpe del 10 de marzo de 1952 y contribuyeron a la instauración de la Tiranía.

c) Las personas que desempeñaron cargos de Ministros, con o sin Cartera, en el Gobierno de facto instaurado le 10 de marzo de 1952 y en el que fué producto de la farsa electoral de 1954, por haber prestado en tal forma su ayuda al mantenimiento de la Tiranía.

d) Las personas electas Senadores y Representantes por los Partidos de la Tiranía, que integraron el Congreso espuria producto de la farsa electoral de 1954.

e) Las personas electas Senadores y Representantes en la farsa electoral de 1954 y que fueron postulados por los llamados Partidos de Oposición y que, además, aspiraron a esos cargos o a cualquier otro cargo electivo en la farsa electoral de 1958, violando la Ley número Dos del Ejército Rebelde sobre tacha y sanción de los participantes en la misma.

f) Las personas que fueron electas para los cargos de Gobernadores Provinciales y Alcaldes Municipales en la farsa electoral de 1954 y desempeñaron sus cargos hasta el dia 31 de diciembre de 1958.

g) Los integrantes del Consejo Consultivo creado de conformidad con lo dispuesto en los artículos 135 y siguientes de la llamada Ley Constitucional de 4 de abril de 1952.

h) Las personas que desempeñaban el 31 de diciembre de 1958 los cargos de Presidente del Banco Nacional de Cuba, del Banco de Fomento Agrícola e Industrial de Cuba, del Tribunal de Cuentas, del Tribunal Superior Electoral y del Tribunal Supremo de Justicia.

i) La persona que desempeñaba el dia 31 de diciembre de 1958 el cargo de Secretario General de la Confederación de Trabajadores de Cuba.

Art. 4.–La confiscación y consecuente adjudicación al Estado Cubano, se extenderá a todos los bienes de las personas comprendidas en el artículo anterior, cuando se acredite que las mismas han sido autoras de malversación de bienes del Estado, o cuando se hayan enriquecido ilícitamente al amparo del Poder Público.

La determinación de esa circunstancia corresponderá a los Tribunales de Justicia o al Ministerio de Recuperación de Bienes Malversados, según los casos y de conformidad con la Ley.

Art. 5.–En los casos de que en las personas comprendidas en esta Ley no concurran las circunstancias que se consignan en el artículo anterior, la confiscación y consecuente adjudicación al Estado Cubano se extenderá solamente a sus bienes en cuanto sean suficientes para reintegrar al Patrimonio Nacional el importe líquido de los sueldos, gastos de representación, dietas, reembolsos y demás retribusación que hubiere percibido con ocasión del desempeño de los respectivos cargos.

Art. 6.–El Ministerio de Recuperación de Bienes Malversados formará las listas de las personas comprendidas en los preceptos anteriores y dispondrá su publicación en la GACETA OFICIAL de la República.

Art. 7.–El Ministerio de Recuperación de Bienes Malversados procederá a ocupar materialmente, todos aquellos bienes cuya confiscación se dispone por la presente Ley, y proveerá lo concerniente a la conservación, depósito, administración, intervención, guarda y vigilancia que dada la naturaleza de dichos bienes, resulten convenientes.

Art. 8.–La confiscación y consecuente adjudicación al Estado Cubano de los bienes a que se contrae la presente Ley; no perjudicará los derechos legítimos de terceras personas en relación con los mismos.

Art. 9.–La confiscación y consecuente adjudicación al Estado Cubano de los bienes integrantes de los Patrimonios de las personas que se relacionan en la presente Ley, es independiente de las facultades y competencia del Ministerio de Recuperación de Bienes Malversados en relación con otras personas beneficiarias de las malversaciones de bienes del Estado y de enriquecimientos ilícitos obtenidos al amparo del Poder Público, no sujetas a estas disposiciones legales de confiscación.

Art. 10.–El Ministro de Recuperación de Bienes Malversados queda encargado del cumplimiento de lo que por la presente Ley se dispone".

Artículo Segundo: Se derogan todas las leyes, decretos-leyes, leyes-decretos y demás disposiciones legales que se opongan a lo dispuesto en la presente Ley, que comenzará a regir desde su publicación en la GACETA OFICIAL de la República.

Por Tanto: Mando que se cumpla y ejecute la presente Ley en todas sus partes.

Dada en el Palacio de la Presidencia, en La Habana, a 17 de marzo de 1959.

MANUEL URRUTIA LLEO.
Fidel Castro Ruz,
Primer Ministro.

Faustino Pérez Hernández,
Ministro de Recuperación
de Bienes Malversados.

APPENDIX E

Memorandum for the United States, Filed in *Banco Nacional de Cuba v. Sabbatino,* pending herein on petition for writ of certiorari, No. 403

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 403

BANCO NACIONAL DE CUBA, PETITIONER

v.

PETER L. F. SABBATINO AS RECEIVER, AND F. SHELTON PARR, WILLIAM F. PRESCOTT, EMMET WHITLOCK, LAWRENCE H. DIXON, H. BARTOW FARR, ELIZABETH C. PRESCOTT, FABIO FREYRE AND HELEN G. DOWNS, CO-PARTNERS DOING BUSINESS AS FARR, WHITLOCK & CO.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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MEMORANDUM FOR THE UNITED STATES

By order of the Court, dated November 20, 1962, the Solicitor General was invited to express the views of the United States. For the reasons indicated below, we believe that the case is one which warrants review by this Court.

1. Two broad and important questions are presented. The first is whether both courts below correctly held that they were not precluded by the Act of State doctrine from adjudicating the validity of certain acts of the Cuban Government. If that question is answered in the affirmative, a second question is posed, *i.e.*, by what standards are domestic courts to be guided in adjudicating the validity of the acts of the foreign state?

Specifically, this litigation involves a challenge to the seizure of property of a private corporation by a sovereign act of the Government of Cuba. As it happens, the plaintiff (petitioner in this Court) is not the former owner seeking to recover its property, but an agency of the foreign sovereign seeking to recover the property (or its proceeds) against a receiver appointed under a statute of the State of New York, who is holding the property for the benefit of shareholders of the former owner. New York Civil Practice Act, Sec. 977-b. In its essential aspects, the case is typical, however, of a large number of pending cases in which the jurisdiction of American courts has been invoked to challenge the validity of foreign nationalizations of property located, at the time of the taking, in the nationalizing country.

A series of such cases was brought in the United States after World War I arising out of nationalizations by the U.S.S.R. See *e.g. Sokoloff* v. *National City Bank*, 239 N.Y. 158, 145 N.E. 917 (1924); *Salimoff & Co.* v. *Standard Oil Co.*, 262 N.Y. 220, 186 N.E. 679 (1933); *Dougherty* v. *Equitable Life Assur. Soc.*, 266 N.Y. 71, 193 N.E. 897 (1934). More recently, nationalizations in Iran and Indonesia have stimulated a series

of cases in foreign courts, though not in the United States. See *e.g.* (Japan) *Anglo-Iranian Oil Co.* v *Idemitsu Kosan Kabushiki Kaisha* [1953], Int'l L. Rep. 305 (1953); (Aden) *Anglo-Iranian Oil Co. Ltd.* v. *Jaffrate* [1953], Int'l L. Rep. 316, 47 Am. J. Int'l L. 325 (Supreme Court of Aden, 1953); (Italy) *Anglo-Iranian Oil Co. Ltd.* v. *S.U.P.O.R. Co.* [1955], Int'l L. Rep. 19 (Court of Venice, 1953); (Italy) *Anglo-Iranian Oil Co., Ltd.* v. *S.U.P.O.R. Co.* [1955], Int'l L. Rep. 23 (Civil Court of Rome, 1954); (Germany) *N.V. Verenigde Deli-Maatschapijen and N. V. Senembah-Maatschappij* v. *Deutsch-Indonesische Tabak-Handelsgesellschaft m.b. H,* Landgericht Bremen, April 21, 1959, 1959 Aussenwirtschaftsdienst des Betriebsberaters 105; Oberlandesgericht Bremen, August 21, 1959, *ibid.*, 207; (Netherlands) *Senembah Maatschappij N. V.* v. *Republik Indonesie Bank Indonesia and de Twentsche Bank N. V.*, Court of Appeals of Amsterdam (1959), Nederlandse Jurisprudentie 218 (No. 73), affirmed (1959) Nederlandse Jurisprudentie 855 (No. 350).

The Cuban nationalizations, which affect in very substantial measure interests of United States citizens have already brought a number of challenges in our courts. As of December 5, 1962, 37 such cases (Appendix A, *infra*, pp. 11-13) were pending in the Southern District of New York alone, some of them involving millions of dollars. The instant decision, which has attracted very wide attention and has already been cited with approval in two Fifth Circuit cases (*Menendez Rodriguez* v. *Pan American Life Insurance Co.*, No. 19130 decided, October 17, 1962; *Pan American Life Insurance Co.* v. *Blanco*, No. 19569, decided November 7, 1962) will doubtless have wide influence upon the disposition of this growing body of litigation.

The court below, affirming the decision of the District Court for the Southern District of New York, held that the acquisition of property in Cuba by the Government of Cuba was subject to review under standards of international law; that the decree by which the Cuban Government acquired the property was in violation of international law; and that, therefore, the Cuban Government could not be said to have title to the property. Thus the court of appeals has passed both upon the reviewability of an act of a foreign state and upon the question of the standards by which an act of nationalization is to be judged. Neither of these questions has been recently examined by this Court, and, in our view, both have substantial public importance.

2. In *Oetjen* v. *Central Leather Company*, 246 U.S. 297, and *Ricaud* v. *American Metal Company*, 246 U.S. 304, this Court held that the former owner of property confiscated by the Government of Mexico could not recover the property when it came into the United States, even if the property had been taken, as alleged by plaintiffs, in violation of international law. This was so, said the Court, because of the "principle that the conduct of one independent government cannot be successfully questioned in the courts of another * * *" (246 U.S. at 303). The *Oetjen* and *Ricaud* decisions were based on an earlier decision of this Court in *Underhill* v. *Hernandez*, 168 U.S. 250, in which Chief Justice Fuller, speaking for the Court, wrote (p. 252):

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.

The New York Court of Appeals has applied this doctrine to the acts of a *de facto* government not recognized by the United States (the Soviet Union), *Salimoff & Co.* v. *Standard Oil Co.*, 262 N.Y. 220, 186 N.E. 679 (1933), and the Court of Appeals for the Second Circuit has applied it to the acts of a government (Republic of Spain) recognized by the United States at the time of the act but not at the time of the decision of the case, *Banco de Espana* v. *Federal Reserve Bank*, 114 F. 2d 438. The Second Circuit also applied the doctrine to defeat the claim of a former German Jew to property taken from him as the result of confiscatory and discriminatory acts of the Nazi Government of Germany, *Bernstein* v. *Van Heyghen, Freres, S.A.*, 163 F. 2d 246, certiorari denied, 332 U.S. 772. In that case, the court said that, although the Government of Germany no longer existed and the alleged acts were incompatible with American standards, the remedies were up to the Executive Branch (through such means as the restitution and reparations procedures then being worked out) and that claims generated by the acts of the German state could not be adjudicated in our courts.

Following the decision in the first *Bernstein* case, counsel for the plaintiff wrote to the Department of State to ascertain the views of the Executive Branch. He received a reply (with copies for counsel to all the parties and the court) from the Acting Legal Adviser, Department of State, stating that:

> The policy of the Executive with respect to claims asserted in the United States for restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution in Germany, is

> to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials. [Dept. State Bull. 592 (May 8, 1949).]

In a subsequent case brought by the same plaintiff against different defendants, but upon substantially similar facts, the court of appeals, amending an earlier decree, 173 F. 2d 71 (C.A. 2), held that the letter from the Acting Legal Adviser removed the restraint the courts had been under in examining the acts of the foreign government, and ordered the district court to try the case on the merits. *Bernstein* v. *N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F. 2d 375 (C. A. 2).

3. The premise of the two *Bernstein* cases, read together, is that a court will not examine into the acts of a foreign state affecting property within the latter's territory unless the Executive Branch states, in some formal manner, that it has no objection to such examination. Cf. Restatement, *The Foreign Relations Law of the United States*, Sec. 44 (proposed official draft, May 3, 1962). We take no position at this time as to whether this is a permissible or desirable limitation on the Act of State doctrine. The court of appeals in the instant case assumed that it had a "Bernstein letter," 307 F. 2d 845, 858 (C. A. 2), but a full account of the correspondence and surrounding circumstances (which counsel did not lay before the court) makes it plain that the assumption was erroneous.

The correspondence in question (Appendix B, *infra*, pp. 14-43) took place between October 10, 1961 and November 21, 1961, *i.e.*, after the briefs in the court of appeals had been filed. In that interval, counsel for the receiver addressed one letter to the Secretary of State and counsel for the amici curiae directed 11 letters to members of the Executive Branch, including the Solicitor General, the Secretary of State, the Under Secretary of State for Economic Affairs, the Legal Adviser, the Deputy Legal Adviser and the Special Assistant to the Legal Adviser, Department of State, the Assistant Secretary of State for Inter-American Affairs, and the Administrator, Agency for International Development. While the letters differed in detail, the purpose of all of them was to obtain agreement from the Executive Branch with the position of the respondents and the amici curiae. They contrasted statements issued by the Department of State in the Summer of 1960 condemning the Cuban nationalizations with certain statements by the State and Justice Departments in the course of a lawsuit involving the M. V. *Bahia de Nipe* in August and September, 1961, *Rich* v. *Naviera Vacuba, S.A.*, 197 F. Supp. 710 (E.D. Va.) affirmed 295 F. 2d 24 (C. A. 4). Ultimately, they sought from the Executive Branch, and particularly from the Department of State, a clear declaration that would serve to lift any restraint upon the judiciary's examination of acts of nationalizations by the Government of Cuba.

The Department of State issued only one reply,[1] a letter from the Under Secretary of State for Economic Affairs, dated November 14, 1961, reading as follows:

[1] The Solicitor General's merely acknowledged receipt of the letter.

DEAR MR. LAYLIN: The Secretary has asked me to reply to your letter of October 24, 1962 to him concerning certain litigation in which your client, the Cuban-American Sugar Company, is interested.

I have carefully considered your letter and have discussed it with the Legal Adviser. Our conclusion, in which the Secretary concurs, is that the Department should not comment on matters pending before the courts.

Sincerely yours,

/s/ GEORGE W. BALL,
Under Secretary for Economic Affairs

In addition to the letter from Under Secretary Ball quoted above, the Court of Appeals was presented with another letter, written by the Legal Adviser of the Department of State. Since only part of that letter seems to have been presented to the court below (by means of Appendix V to the brief of the amici curiae, filed several months after the brief itself) and since the court apparently placed reliance on this letter, we shall set forth briefly the circumstances surrounding this letter and quote its full text.

In the weeks following October 10, 1961, Mr. John Laylin, counsel for the amici curiae, wrote letters to several members of the Executive Branch and also sought appointments in order to present his arguments in person. He had made a tentative appointment with Mr. Chayes, the Legal Adviser, but the latter was forced to cancel the appointment because of a trip abroad. Shortly before he left for Africa, Mr. Chayes telephoned to Mr. Laylin to cancel the appointment, discuss the case briefly, and to suggest that Mr. Laylin talk with his Special Assistant, Mr. Lowenfeld, and with

the Deputy Legal Adviser, Mr. Meeker, both of whom were familiar with the case. Confirming this telephone call, Mr. Chayes wrote the following letter to Mr. Laylin:

> DEAR JOHN: I received your letter of October 10, 1961, as well as the copy of your letter of the same date to George Ball, which he has asked me to answer. As I mentioned on the telephone this afternoon, I am about to leave on a two-week trip to Europe and Africa. Let me just confirm here briefly the thoughts I expressed to you over the telephone.
>
> The Department of State has not, in the *Bahia de Nipe* case or elsewhere, done anything inconsistent with the position taken on the Cuban nationalizations by Secretary Herter. Whether or not these nationalizations will in the future be given effect in the United States is, of course, for the courts to determine. Since the *Sabbatino* case and other similar cases are at present before the courts, any comments on this question by the Department of State would be out of place at this time. As you yourself point out, statements by the executive branch are highly susceptible of misconstruction.
>
> I am sure that you will have a fruitful discussion with Mr. Meeker and Mr. Lowenfeld, both of whom are well informed on all of these cases.
>
> With best regards,
>
> Sincerely yours,
>
> /s/ Abe,
>
> ABRAM CHAYES.

In our view, Mr. Chayes' letter was in effect a refusal to express an opinion upon whether the Cuban nationalizations should be given effect in the courts either because of the Act of State doctrine or for any other reason. Regardless of its meaning, however, the full letter, as well as the circumstances, makes it clear that Mr. Chayes was not making an official expression of the views of the Executive Branch. The letter of the Under-Secretary, Mr. Ball, represents nothing more than a statement of "no comment." Mr. Laylin's subsequent letters are obviously self-serving.

The Court's invitation to the Solicitor General, at this stage of the proceeding, apparently does not seek an expression of the views of the Executive Branch upon the substantive merits of the questions presented. In the event that a writ of certiorari is granted, as urged in this memorandum, the Solicitor General will undertake to present a full statement of the position of the Executive Branch and supporting argument upon the merits.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

DECEMBER 1962.